UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 68

Docket No. SF-0752-12-0510-I-1

Georgiana R. Johnson,

Appellant,

v.

United States Postal Service,

Agency.

September 9, 2013

Michael Stichler, Santa Barbara, California, for the appellant.

Sara K. Snyder, Esquire, San Francisco, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that affirmed her removal from federal service for inability to perform the essential functions of her position. For the reasons set forth below, we DENY the petition for review and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still SUSTAINING the appellant's removal. We are issuing a precedential Opinion and Order to provide further guidance concerning how a recent United States Supreme Court decision affects our practice of providing appellants with notice of their review rights in final Board decisions.

BACKGROUND

¶2 Effective April 5, 2012, the agency removed the appellant from her Supervisor of Customer Service position based on a charge of inability to perform the essential functions of her position. Initial Appeal File (IAF), Tab 6 at 34-39 of 143. The appellant filed an appeal in which she alleged disability discrimination. IAF, Tab 2 at 5, 8, 10. Subsequently, acting through her counsel, the appellant withdrew her disability discrimination claim. IAF, Tab 11 at 4; Tab 13 at 1. After affording the appellant her requested hearing, the administrative judge affirmed the removal action upon finding that the agency proved the charge, the action promoted the efficiency of the service, and the penalty of removal was reasonable. IAF, Tab 15.

¶3 The appellant petitions for review of the initial decision. Petition for Review (PFR) File, Tab 1. The agency has not responded to the petition for review.

ANALYSIS

The administrative judge correctly found that the agency proved by preponderant evidence that the appellant was unable to perform the essential functions of her position.

¶4 An agency may remove an employee if she is unable, because of a medical condition, to perform the duties of her position. *Edwards v. Department of Transportation*, 109 M.S.P.R. 579, ¶ 15 (2008); *Bullock v. Department of the Air Force*, 88 M.S.P.R. 531, ¶ 7 (2001). In this case, the appellant's Supervisor of Customer Service duties required her, among other duties, to supervise letter carriers in the field in order to assess their performance and to evaluate the efficiency of the route. Hearing Compact Disc (HCD), Track 1, testimony of Lowana Gooch; HCD, Track 2, testimony of Anita Richardson. Supervisors are required to perform these duties by direct observation in the field, mostly on foot. HCD, Track 1, testimony of Gooch. Further, the Postmaster testified that supervisors were expected to go out several times a week on average and that

none of the Supervisor of Customer Service positions involved 8 hours of work per day in the office. *Id.*

¶5 At the time of her removal, the appellant occupied a modified duty assignment that restricted her to 0 to 2 hours per day of walking and performing field observations either on foot or in a vehicle. IAF, Tab 6 at 27-28 of 31. The administrative judge found, and the parties do not dispute on petition for review, that the appellant stopped reporting for work in May 2010. IAF, Tab 15, Initial Decision (ID) at 2. Between November 5, 2010, and March 1, 2012, the date of the notice of proposed removal, the appellant submitted consistent medical documentation from her physician, Dr. Fred Blackwell, stating that she was "unable to work" and setting a possible date for returning to duty for 1 to 3 months in the future.[1] HCD, Track 1, testimony of Gooch, Track 2, testimony of Richardson.

¶6 In light of the appellant's medical documentation at the time of her removal, the administrative judge correctly found that the agency proved that the appellant was unable to work because of a medical condition. ID at 2-5. This conclusion is supported by the fact that the Office of Workers' Compensation Programs (OWCP) continued to pay her benefits throughout the relevant time period. IAF, Tab 6 at 46 of 143; Tab 12 at 17, 38; *see Edwards*, 109 M.S.P.R. 579, ¶ 15 (the provision of OWCP benefits supports a finding that the employee was unable to work). It is also supported by the fact that the appellant repeatedly submitted medical documentation indicating that she could return to work in the future but, when that date came, she continued to be unable to report for work. IAF, Tab 6 at 47; Tab 12 at 101-08, 110-11, 113-16, 119-20; HCD, Track 1,

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[1] The appellant submitted medical documentation from Dr. Blackwell stating that she was unable to work on November 5 and December 20 in 2010; January 14, February 4, March 11, April 15, June 28, July 29, September 9 and 23, October 14, November 4, 11, and 18, and December 16 in 2011; and January 27 and February 17 in 2012. IAF, Tab 6 at 47 of 143; Tab 12 at 101-08, 110-11, 113-16, 119-20.

testimony of Gooch, Track 2, testimony of Richardson. Nothing in this pattern of medical documentation reasonably suggests that there was a foreseeable end to the appellant's absence. *See Edwards*, 109 M.S.P.R. 579, ¶ 17 (in finding removal warranted based on an employee's unavailability for duty due to her incapacitation, the Board has relied on the absence of any foreseeable end to the unavailability). Further, the evidence shows that the appellant's absence was a burden to the agency because it could not fill her position with a permanent supervisor while she was on the rolls, and the temporary supervisors the agency used in the interim were not as skilled or experienced and could not be held accountable for their performance in the same manner as permanent supervisors. HCD, Track 2, testimony of Richardson. The agency has since filled the appellant's position, lending further support to the agency's evidence that the appellant was needed at work. *Id.; cf. Edwards*, 109 M.S.P.R. 579, ¶¶ 17, 22 (that the agency failed to show that the appellant's absence was a burden or that her position urgently needed to be filled, were factors to consider in determining whether the appellant's removal promoted the efficiency of the service).

¶7 The appellant asserts that the agency should have relied on the medical opinion of Dr. Mohinder Nijjar, who performed a second opinion evaluation at the direction of OWCP on or about November 23, 2011. Petition for Review (PFR) File, Tab 1 at 3. That opinion concluded that the appellant could not perform the full range of her duties, but that she could work an 8-hour day with the restrictions of no lifting, pushing, or pulling more than 20 pounds; no kneeling, squatting, or climbing; and no more than 2 hours per day of walking, standing, or driving, with a break of 5 minutes every 30 minutes. IAF, Tab 6 at 63 of 143. In a December 23, 2011 response to Dr. Nijjar's report, Dr. Blackwell stated that he concurred with Dr. Nijjar's findings, except that he believed that the appellant should be restricted to lifting no more than 5 pounds, should not walk or stand for longer than 20 minutes without a break, and should not drive at all. *Id.* at 50 of 143. Despite professing the opinion on

December 23, 2011, that the appellant could work with restrictions, Dr. Blackwell prepared medical documentation on December 16, 2011, and January 27, 2012, stating that the appellant was unable to work at all. IAF, Tab 12 at 101-02. Thus, Dr. Nijjar's opinion is contradicted by the great weight of consistent reports from Dr. Blackwell over a 2-year period and cannot be considered to be dispositive evidence that the appellant was able to work.

¶8 The appellant has also submitted medical evidence dated May 18, 2012, (approximately 6 weeks after the removal became effective) indicating that she can work with restrictions. IAF, Tab 12 at 51. The Board has held that a removal for physical inability to perform the functions of a position cannot be sustained when the appellant diligently obtains and presents new medical evidence showing that she has recovered from the condition that previously prevented her from performing the duties of her position. *Edwards*, 109 M.S.P.R. 579, ¶ 19; *Morgan v. U.S. Postal Service*, 48 M.S.P.R. 607, 611-13 (1991). In the appellant's new medical evidence, Dr. Blackwell stated that the appellant is restricted from lifting more than 10 pounds; no climbing, kneeling or squatting; standing or walking for no more than "20-30 min per hr"; and sitting no more than 45 minutes per hour. IAF, Tab 12 at 51. As the administrative judge correctly found, Dr. Blackwell did not relate the appellant's medical restrictions to the duties of her position. ID at 6. Moreover, these new restrictions are still inconsistent with the duties of the appellant's position, which require, on average, three trips to the field per week of 20 minutes to 3 hours each. HCD, Track 1, testimony of Gooch, Track 2, testimony of Richardson. The agency presented evidence that field work is an essential function of the position because, not only does it allow for better evaluation of employee performance, it is also one of the agency's ways of verifying the accuracy and appropriateness of a delivery route. HCD, Track 1, testimony of Gooch. Therefore, we find that the appellant's post-removal medical documentation does not clearly show that she is able to perform the essential functions of her position, and it does not warrant a different outcome in

this case. *See Casillas v. Department of the Air Force*, 64 M.S.P.R. 627, 633-34 (1994) (the appellant's post-removal evidence did not show unambiguously that he was completely recovered from his disability and could perform the essential functions of his position).

¶9 The appellant also asserts that the agency failed to work with the agency's District Reasonable Accommodation Committee to find ways to accommodate her medical condition. PFR File, Tab 1 at 3-4. The Board has held that an agency is not required prove as part of its charge that it considered accommodation where, as here, there is no disability discrimination issue in the case. *Marshall-Carter v. Department of Veterans Affairs*, 94 M.S.P.R. 518, ¶¶ 12-13 (2003), *aff'd*, 122 F. App'x 513 (Fed. Cir. 2005); *see* IAF, Tab 11 at 4.

¶10 However, if the evidence established that the appellant was capable of performing the duties of a vacant lower-graded position to which she could have been reassigned, that is a proper consideration in determining whether removal is the appropriate penalty. *Marshall-Carter*, 94 M.S.P.R. 518, ¶ 14. On petition for review, the appellant argues that the agency should have accommodated her in her former position, rather than in a vacant lower-graded position. PFR File, Tab 1 at 3; *see* IAF, Tab 1 at 4; Tab 11, Exhibit A. As explained previously, the appellant was unable to perform the essential functions of her former position. The agency is not required to modify or eliminate duties that are an essential function of the position. *Henry v. Department of Veterans Affairs*, 100 M.S.P.R. 124, ¶ 10 (2005). Accordingly, removal is appropriate in this case.

The administrative judge correctly provided the appellant with non-mixed notice of her right to review of a final Board decision.

¶11 The United States Supreme Court recently clarified an appellant's right to seek review in federal court of a final Board decision in a mixed-case appeal under 5 U.S.C. § 7702 in *Kloeckner v. Solis*, 133 S. Ct. 596 (2012). Consistent with the Supreme Court's decision, we recently held that the Board will provide notice of mixed-case appeal rights in all cases in which the appellant was affected

by an action that she may appeal to the Board and alleges prohibited discrimination, regardless of whether we decide the claim of discrimination. *Cunningham v. Department of the Army*, 119 M.S.P.R. 147, ¶ 14 (2013).

¶12 Here, the appellant appealed her removal, an action that is appealable to the Board under 5 U.S.C. §§ 7512(1), 7513(d) and 7701(a), and she alleged prohibited discrimination in her appeal, *see* IAF, Tab 2 at 5, 8, 10. However, during the adjudication of her appeal, the appellant, through counsel, clearly and unequivocally withdrew her discrimination claim. IAF, Tab 11 at 4; Tab 13 at 1. Although the appeal was a mixed-case appeal when filed, it became a non-mixed appeal when the appellant withdrew her discrimination claim.[2] As such, this is no longer an appeal in which the appellant "alleges prohibited discrimination." *See Kloeckner*, 133 S. Ct. at 603-04; *Cunningham*, 119 M.S.P.R. 147 , ¶¶ 13-14. This case is distinguishable from *Mills v. U.S. Postal Service*, 119 M.S.P.R. 482 , ¶ 9 (2013), where we state that an appellant cannot "transform a mixed case into a non-mixed case after the Board has issued a decision simply by not seeking judicial review of a discrimination claim," as the appellant herein withdrew her discrimination claim before the administrative judge issued a decision. Accordingly, we afford the appellant notice of non-mixed appeal rights.

ORDER

¶13 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

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[2] The Board's regulations similarly provide that an appellant may raise a claim of prohibited discrimination during the adjudication of her Board appeal, meaning that an appeal can be non-mixed when filed but become mixed while the appeal is pending. 5 C.F.R. § 1201.156(b).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and

appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.